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BELK v. COMMISSIONER: LAND SUBSTITUTIONS IN CONSERVATION EASEMENTS

*Morgan Davis**

I. INTRODUCTION

The Internal Revenue Code permits landowners to take an income tax deduction for donating a “conservation easement.”¹ A conservation easement restricts land development in favor of one or more conservation goals.² These goals may include the preservation of land for public outdoor recreation or education, the protection of a natural habitat of wildlife or plants, the preservation of open space for scenic enjoyment, or the preservation of a historically important area.³

For example, suppose a landowner owns property abutting a river that is the natural habitat for a population of fish. The landowner may donate a conservation easement extinguishing her right to develop the land in order to protect the natural habitat. This donation constitutes a charitable contribution and entitles the landowner to take an income tax deduction.⁴ Conservation easements that qualify for an income tax deduction are referred to as “qualified conservation contributions” and are deductible under section 170(h) of the Internal Revenue Code (the “Code”).⁵

B.V. Belk Jr. and Harriet C. Belk (“Petitioners”) sought to take advantage of the conservation easement deduction. Petitioners

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1. See 26 U.S.C. § 170(h)(2)(C) (2012); Roger Colinvaux, *The Conservation Easement Tax Expenditure: In Search of Conservation Value*, 37 COLUM. J. ENVTL. L. 1, 3–4 (2012).

2. Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 741–42 (2002).

3. See 26 U.S.C. § 170(h)(4)(A); Connie Kertz, *Conservation Easements at the Crossroads*, 34 REAL EST. L.J. 139, 143 (2005).

4. See 26 U.S.C. § 170(h).

5. *Id.* § 170. Title 26 of United States Code is referred to as the Internal Revenue Code.

donated a conservation easement and claimed a deduction of more than \$10.5 million in 2004.⁶ The easement protected a golf course nestled within a private residential complex.⁷ Petitioners' easement included a "substitution provision" whereby the parties could agree to change what land was subject to the easement's development restrictions.⁸ In *Belk v. Commissioner (Belk I)*,⁹ the tax court denied Petitioners' charitable contribution deduction, holding that Petitioners' easement was not a restriction "granted in perpetuity" as required by the Code.¹⁰

Since Congress first allowed conservation easement deductions in 1976,¹¹ donations of conservation easements have rapidly increased.¹² Now, an estimated forty million acres in the United States are encumbered by conservation easements.¹³ Furthermore, donations of conservation easements typically generate six-figure deductions.¹⁴ Conservation easement deductions cost taxpayers billions of dollars in the form of foregone tax revenue.¹⁵ One estimate provides that \$3.6 billion total revenue was lost between 2003 and 2008, not including corporate donations of conservation easements.¹⁶

The court in *Belk I* held that any conservation easement containing a substitution provision was not eligible for a charitable contribution deduction.¹⁷ The court's decision discourages taxpayers from including substitution provisions in their conservation easements because such easements will not receive favorable tax

6. *Belk v. Comm'r (Belk I)*, 140 T.C. 1, 6 (2013). Precisely, Petitioners claimed a deduction in the amount of \$10,524,000. *Id.*

7. *Id.* at 3.

8. *Id.* at 3–4.

9. 140 T.C. 1 (2013).

10. *Id.* at 10, 15.

11. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2124(e)(1)(C), 90 Stat. 1916, 1919 (1967) (codified in scattered sections of 26 U.S.C.).

12. Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVT'L. L. REV. 119, 119 (2010).

13. Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go From Here?*, 2013 UTAH L. REV. 687, 717 (2013).

14. *Id.* at 715–16.

15. *Id.* at 716.

16. Colinvaux, *supra* note 1, at 9–10 n.26.

17. *Belk I*, 140 T.C. 1, 10–11 (2013); *see Belk v. Comm'r (Belk II)*, 105 T.C.M. (CCH) 1878, *6–7 (2013).

treatment. This outcome is undesirable because substitution provisions can help easements achieve their conservation goals.¹⁸

Part II of this Comment presents the facts of *Belk I*, and Part III explains the court's reasoning. Part IV.B analyzes the court's reasoning in *Belk I* and explains that Petitioners granted an easement in perpetuity. Part IV.C analyzes *Belk I*'s subsequent history, *Belk v. Commissioner T.C.M. (Belk II)*,¹⁹ and concludes that the court was primarily concerned with how Petitioners valued their easement. Part IV.D argues for the desirability of substitution provisions, explaining that such provisions can help achieve an easement's conservation purposes. Part V proposes a rule for handling future substitution provisions. Finally, Part VI presents the issue of whether easements protecting golf courses, like Petitioners' easement, should be categorically ineligible for the deduction under section 170.

II. STATEMENT OF THE CASE

In *Belk I*, Petitioners owned approximately 410 acres of land, which they transferred to their limited liability company Olde Sycamore, LLC ("Olde Sycamore").²⁰ Olde Sycamore built a residential community on the land, which included a semi-public golf course.²¹ The golf course was not contiguous, but lay in clusters throughout the residential development.²² In total, the golf course consisted of roughly 185 acres.²³

Olde Sycamore granted a conservation easement to Smokey Mountain National Land Trust (SMNLT) that prohibited the 185-acre golf course from being used for residential, commercial, institutional, industrial, or agricultural purposes.²⁴ The agreement stated, and the parties later stipulated, that the golf course possessed recreational, natural, scenic, open space, and educational values.²⁵

The agreement contained a "substitution provision," whereby Petitioners and SMNLT could mutually agree to change what

18. See Bray, *supra* note 12, at 138 (discussing the desirability of "shifting" easements).

19. 105 T.C.M. (CCH) 1878 (2013).

20. *Belk I*, 140 T.C. at 2.

21. *Id.* at 2-3.

22. *Id.* at 3.

23. *Id.* Precisely, the golf course covered 184.627 acres, *id.*, but for the sake of simplicity, I will refer to the specific acres on which the golf course sits as 185 acres.

24. *Id.*

25. *Id.* at 3 n.7.

property was subject to the conservation easement and its accompanying restrictions.²⁶ The substitution provision, which allowed Petitioners to substitute an area of contiguous land for land currently restricted by the easement, provided in relevant part that (1) the substituted land was of equal or greater area than the land to be taken out; (2) the substitution would not adversely affect the conservation purpose of the easement or any other significant environmental features of the easement; and (3) the fair market value of SMNLT's conservation easement would not decline as a result of the substitution.²⁷ The substitution provision further provided that if SMNLT did not consent to a proposed substitution, SMNLT would help Petitioners identify land that would meet all of the substitution provision's requirements "but also accomplish [Petitioners'] objectives."²⁸

Petitioners claimed a charitable contribution deduction of \$10,524,000 for donating the conservation easement.²⁹ They calculated the amount of the deduction by taking the difference between the fair market value of the 185 acres unrestricted and the fair market value of the 185 acres restricted by the easement.³⁰ The Commissioner of Internal Revenue disallowed Petitioners' deduction, and they contested the Commissioner's finding in court.³¹ The tax court held that Petitioners were not entitled to a charitable contribution deduction because their "floating easement"³² was not a "qualified conservation contribution."³³

III. REASONING OF THE COURT

The tax court began by explaining that section 170 of the Code governs charitable contribution deductions.³⁴ Section 170(f) prohibits

26. *Id.* at 3.

27. *Id.* at 3–4. The substitution provision additionally provided that in the opinion of SMNLT, (1) the substituted land was of the same or better ecological stability as the land to be taken out; (2) the substitution would have no adverse impact on the environmental features of the conservation area, nor adversely impact it in any way; and (3) petitioners had to submit sufficient documentation to SMNLT showing how the substitution met the required criteria. *Id.*

28. *Id.*

29. *Id.* at 5–6.

30. *Id.* at 5.

31. *Id.* at 6.

32. *Id.* at 10.

33. *Id.* at 10–11, 15.

34. 26 U.S.C. § 170 (2012); *Belk I*, 140 T.C. at 6.

charitable contribution deductions for transfers of partial interests in property, such as an easement, but provides an exception for “qualified conservation contributions.”³⁵ A qualified conservation contribution is a (1) qualified real property interest; (2) transferred to a qualified organization; (3) exclusively for conservation purposes.³⁶ A qualified real property interest includes “a restriction (granted in perpetuity) on the use which may be made of the real property.”³⁷ Additionally, for a contribution to be made “exclusively for conservation purposes,” the conservation purpose must be protected in perpetuity.³⁸

The court held that Petitioners’ donated easement was not a restriction granted in perpetuity, and thus, Petitioners did not make a qualified conservation contribution entitling them to a deduction.³⁹ The court found that Petitioners donated an interest in their golf course.⁴⁰ The restriction on the golf course was not granted in perpetuity, however, because Petitioners could change what land was subject to the easement.⁴¹ In essence, the court found that Petitioners had agreed not to develop the golf course, but simultaneously had retained the right to develop the golf course through the substitution provision.⁴² Thus, Petitioners did not donate an interest in real property that was subject to a restriction in perpetuity.⁴³

The court rejected Petitioners’ argument that because the conservation *purpose* was protected in perpetuity, the *restriction* was granted in perpetuity also.⁴⁴ The court distinguished between the requirements that (1) the *use restriction* be granted in perpetuity, and (2) the *conservation purpose* be protected in perpetuity.⁴⁵ The court held that the restriction was not granted in perpetuity.⁴⁶ Consequently, the court did not address whether the conservation

35. *Belk I*, 140 T.C. at 6–7 (citing 26 U.S.C. §§ 170(f), (h)).

36. 26 U.S.C. § 170(h)(1); *Belk I*, 140 T.C. at 7.

37. 26 U.S.C. § 170(h)(2)(C); *Belk I*, 140 T.C. at 9.

38. 26 U.S.C. § 170(h)(5)(A).

39. *Belk I*, 140 T.C. at 15.

40. *Id.* at 10.

41. *Id.*

42. *Id.* at 10–11.

43. *Id.* at 11.

44. *Id.* at 12.

45. *Id.*

46. *Id.* at 10.

purpose was protected in perpetuity.⁴⁷ Petitioners filed a motion for reconsideration, but the motion was denied in *Belk II*.⁴⁸

IV. ANALYSIS

A. Historical Significance

The distinction the court in *Belk I* made between the requirement that the restriction be granted in perpetuity (the “restriction-in-perpetuity requirement”) and the requirement that the conservation purpose be protected in perpetuity (the “conservation-purpose-perpetuity requirement”) marks a departure from previous interpretations of section 170(h).⁴⁹ In *Belk I*, the Commissioner combined discussion of both requirements.⁵⁰ In previous decisions the court itself combined its discussion of both requirements, suggesting that they were equivalent.⁵¹

Additionally, the U.S. Department of Treasury has merged the two requirements.⁵² The U.S. Department of Treasury publishes federal income tax regulations, which represent the “official” (i.e., executive) interpretations of the Code.⁵³ The Treasury Regulation interpreting section 170(h), Reg. § 1.170A-14, discusses “the perpetuity requirement” in subsection (g) without mentioning whether it refers to the restriction or the conservation purpose.⁵⁴ In fact, subsection (g) mentions both the restriction-in-perpetuity and the conservation-purpose-perpetuity requirements. Subsection (g)(1) discusses the perpetuity requirement “in general” and mentions the

47. *Id.* at 15.

48. *Belk II*, 105 T.C.M. (CCH) 1878 (2013).

49. *Belk I*, 140 T.C. at 11–12 (citing *Simmons v. Comm’r*, 98 T.C.M. (CCH) 211 (2009); *Turner v. Comm’r*, 126 T.C. 299, 311 (2006); *Glass v. Comm’r*, 124 T.C. 258, 276–77 (2005)).

50. *Belk I*, 140 T.C. at 11.

51. *Id.* at 11–12 (citing *Simmons*, 98 T.C.M. (CCH) at 211; *Turner*, 126 T.C. at 311; *Glass*, 124 T.C. at 276–77).

52. See Treas. Reg. § 1.170A-14(g) (as amended in 2009).

53. See *Tax Code, Regulations and Official Guidance*, IRS, <http://www.irs.gov/Tax-Professionals/Tax-Code,-Regulations-and-Official-Guidance> (last updated Feb. 24, 2014). Section 7805 of the Code gives the IRS the authority to interpret its provisions. 26 U.S.C. § 7805 (2012). Courts give deference to the regulations, but they are not law. See generally Ellen P. Aprill, *Muffled Chevron: Judicial Review of Tax Regulations*, 3 FLA. TAX REV. 51 (1996) (discussing the appropriate degree of deference courts should give to the regulations).

54. Treas. Reg. § 1.170A-14(g).

conservation-purpose-perpetuity requirement.⁵⁵ However, subsection (g)(3) discusses the restriction-in-perpetuity requirement.⁵⁶ In holding that the restriction-in-perpetuity requirement and the conservation-purpose-perpetuity requirement are distinct, the court explained that Treasury Regulation § 1.170A-14(g) pertains only to the conservation-purpose-perpetuity requirement.⁵⁷ Yet even after *Belk I*, tax courts have continued to use the regulation in their analysis of the restriction-in-perpetuity-requirement.⁵⁸ If the court's distinction continues to hold, the regulations should be amended to clearly set out which rules apply to which requirement.

Belk I renders all conservation easements that allow for substitutions ineligible for a deduction because they are not restrictions granted in perpetuity and, therefore, are not a “qualified real property interest.”⁵⁹ The discussion that follows analyzes the soundness of the court's arguments in *Belk I* and *Belk II* and the desirability of their holdings.

B. Belk I

The court in *Belk I* did not address whether Petitioners transferred a property interest “exclusively for conservation purposes.”⁶⁰ For the sake of argument, this Comment assumes that Petitioners did, and that the “conservation purpose” was to preserve

55. *See id.* § 1.170A-14(g)(1) (“[A]ny interest in the property retained by the donor . . . must be subject to legally enforceable restrictions . . . that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation.”).

56. *See id.* (explaining that an easement does not fail to be a qualified conservation contribution merely because the donee's interest would fail on the happening of some remote event); *see also* *Graev v. Comm’r*, 140 T.C. 377, 392–93 (2013) (using Treasury Regulation subsection (g)(3) to explain the restriction-in-perpetuity requirement (26 U.S.C. § 170(h)(2)(C))).

57. *Belk I*, 140 T.C. 1, 12 n.19 (2013) (explaining that Treasury Regulation section 1.170A-14(g) relates to code section 170(h)(5), which is the conservation-purpose-perpetuity requirement).

58. *See, e.g., Graev*, 140 T.C. at 393 (decided after *Belk I* and discussing Treasury Regulation section 1.170A-14(g)(3) while analyzing the restriction-in-perpetuity requirement (26 U.S.C. § 170(h)(2)(C))); *Gorra v. Comm’r*, 106 T.C.M. (CCH) 523, *20 (2013) (also decided after *Belk I* and clarifying the restriction-in-perpetuity requirement with reference to Treasury Regulation section 1.170A-14(g)(1)).

59. *Belk II*, 105 T.C.M. (CCH) 1878, *2, *6–7 (2013).

60. *See Belk I*, 140 T.C. at 15 (concluding that Petitioners have not satisfied section 170(h)(2)(C), relating to a qualified real property interest, and therefore Petitioners are not entitled to a deduction).

the “recreational, open-space and scenic value” of the golf course, as stipulated by the parties.⁶¹

Petitioners arguably transferred a restriction on real property in perpetuity. Neither party could extinguish the restriction.⁶² The parties could merely agree to change which specific acreage was subject to the easement’s restrictions.⁶³

The court in *Belk I* began with the assumption that Petitioners transferred an interest in “the golf course.”⁶⁴ In fact, Petitioners transferred a more abstract property interest. They transferred an interest in 410 acres of land, whereby at least 185 acres could not be used for residential, commercial, institutional, industrial, or agricultural purposes, and further satisfied the requirements of the substitution provision.⁶⁵ Petitioners did not promise to refrain from developing the golf course, as the court claimed.⁶⁶ Rather, Petitioners promised to maintain at least 185 acres of land undeveloped, and promised to preserve recreational, open-space, and scenic value at least to the extent the golf course possessed these values.⁶⁷ This promise is not illusory: it limits how much Petitioners can develop their land in favor of the conservation value of the golf course. Construed in this way, the restriction exists in perpetuity. At any given moment, the restriction is in effect, but what specific acreage is giving it effect is subject to change. Thus, the court in *Belk I* should have held that Petitioners granted a restriction in perpetuity.

C. Belk II

On Petitioners’ request for reconsideration, the court in *Belk II* maintained that a qualified real property interest must be a specific and identifiable piece of real property.⁶⁸ The court went on to explain its reasons for denying the deduction and, in so doing, revealed that its discomfort with Petitioners’ easement was not with the

61. *Id.* at 3 n.7.

62. *See id.* at 3–4.

63. *Id.*

64. *Id.* at 10.

65. *Id.* at 2–3. The Commissioner of Internal Revenue characterized Petitioners’ easement as a “floating easement,” which is a helpful label for easements that allow for substitutions. *Id.* at 10.

66. *Id.* at 10–11.

67. *See id.* at 3–5.

68. *Belk II*, 105 T.C.M. (CCH) 1878, *7–8 (2013).

restriction's lack of perpetuity but with how Petitioners valued their easement. The Court thus explained:

When a taxpayer donates a partial interest, he retains the remaining interest in the property. Thus, the taxpayer is effectively splitting the property into two pieces: (1) the retained portion and (2) the donated portion. Petitioners' interpretation of the statute would allow the donated portion (i.e., the easement) to encumber any piece of property; it could be the retained portion or another piece of property that the taxpayer owns . . . If the donated portion does not restrict the use of the retained portion, then the taxpayer has retained 100% of the economic value of the property *for which he or she is taking a deduction*. The fact that the donated property might encumber and thus reduce the value of some unrelated property is irrelevant.⁶⁹

Here, the court still assumed that Petitioners had retained an interest in "the golf course."⁷⁰ In fact, Petitioners had retained an interest in the full 410 acres of land. The "donated portion" of the 410 acres was the requirement that at least 185 acres of the 410 remain undeveloped and possess the current golf course's conservation value. Petitioners did not retain 100 percent of the economic value of the 410 acres because they could not develop all 410 acres: at least 185 acres had to remain undeveloped and effectuate the conservation purposes of the easement.

Yet, Petitioners calculated their deduction as the difference in value between the *golf course* unrestricted and the *golf course* subject to the easement's restrictions.⁷¹ In other words, Petitioners' value of the easement assumed that the easement would always restrict the golf course.⁷² Petitioners' valuation does not include the fact that they can restrict other portions of the 410 acres in place of the golf course.⁷³ As the court in *Belk II* explained above, Petitioners cannot take a deduction based on the value of the golf course and, at the same time, develop the golf course by restricting other land.⁷⁴

69. *Id.* at *8 (emphasis added).

70. *Id.* at *2–3.

71. *Belk I*, 140 T.C. at 5.

72. *See id.* at 10 n.15.

73. *Id.*

74. *See Belk II*, 105 T.C.M (CCH) 1878, *7–8 (2013).

The land that could be substituted must be factored into the easement's value.

The Treasury Regulations provide that the amount of a charitable deduction for a conservation easement is the fair market value of the easement.⁷⁵ Often, taxpayers are permitted to calculate the value of their easements by taking the difference between the fair market value of the property involved before and after the grant of the easement.⁷⁶ When an easement burdens only a portion of a landowner's contiguous property, the fair market value of the easement is the value of *all* of the landowner's contiguous property before and after granting the easement.⁷⁷ Thus, Petitioners should have valued their easement based on the difference between the fair market value of their 410 acres pre- and post-easement. Specifically, they should have taken the difference between the value of the 410 acres unencumbered, and the value of the 410 acres where 185 of the acres must be used as a golf course, or otherwise possess the current golf course's conservation values.

Valuation is necessarily a fact-specific inquiry,⁷⁸ and possibly, Petitioners could have ascertained additional factors relevant to the easement's value. However, merely taking the golf course's value before the easement and subtracting the value of the golf course subject to the easement's restrictions was not an accurate estimate of the easement's value.⁷⁹ Therefore, the court in *Belk I* or *Belk II* could have denied Petitioners' deduction on valuation grounds.

D. An Outright Ban on Substitution Provisions Is Undesirable

As mentioned above, *Belk I* and *Belk II* render easements with substitution provisions ineligible for the federal income tax deduction in all cases.⁸⁰ But substitution provisions are desirable because they create flexibility in conservation easement

75. Treas. Reg. § 1.170A-14(h)(3)(i) (as amended in 2009).

76. *Id.*; Rev. Rul. 67-246, 1967-2 C.B. 104.

77. *Whitehouse Hotel Ltd. v. Comm'r*, 615 F.3d 321, 338 (5th Cir. 2010); *Browning v. Comm'r*, 109 T.C. 303, 316 (1997); Treas. Reg. § 1.170A-14(h)(3)(i). Additionally, if an easement increases the value of any of the landowner's other property, whether or not contiguous, this increase proportionately decreases the easement's value. *Kertz*, *supra* note 3, at 145.

78. *See, e.g., Stanley Works and Subsidiaries v. Comm'r*, 87 T.C. 389, 408 (1986).

79. *See Kertz*, *supra* note 3, at 145.

80. *Belk II*, 105 T.C.M. (CCH) 1878, *7-8 (2013).

restrictions.⁸¹ Experts in conservation easements have recently argued for increased flexibility in easement restrictions.⁸² Because “[o]ur sense of what is ecologically and scenically valuable . . . evolve[s] over time,”⁸³ inflexible restrictions in conservation easements may obstruct future conservation efforts.⁸⁴ Some scholars are already exploring the desirability of so-called “shifting” conservation easements.⁸⁵ These easements would protect against species loss by tracking “migrating species . . . across different land parcels.”⁸⁶ In order for conservation easements to track migrating species, or account for habitats shifting due to climate change, they need something akin to a substitution provision contained in their terms.⁸⁷

As another example, consider the following hypothetical: suppose a certain taxpayer owns five hundred acres of land. She intends to develop the land but has discovered that a population of endangered species lives somewhere on the premises. So the taxpayer agrees to set aside two hundred acres for habitat preservation. If the precise location of the species is unknown, the taxpayer should be allowed to donate a conservation easement containing a substitution provision so that the parties can later substitute the land that best protects the habitat. Or, suppose after the taxpayer granted the easement, the easement holder determined that a different two hundred acres would better preserve the habitat. In such a case, the parties should be free to substitute the land that better serves the easement’s conservation purposes, pursuant to a substitution provision, and the taxpayer should be entitled to the tax deduction.

81. See Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL. L.J. 121, 122 (2011).

82. See, e.g., Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process* (Case Sch. of Law, Working Paper No. 07-24, 2007), available at <http://ssrn.com/abstract=1004363>.

83. *Id.* at 31.

84. Bray, *supra* note 12, at 138; see Duncan M. Greene, *Dynamic Conservation Easements: Facing the Problem of Perpetuity in Land Conservation*, 28 SEATTLE U. L. REV. 883, 885 (2005) (“[D]ynamic conservation easements capable of accommodating change over time . . . are more likely to fulfill their promise to protect the land in perpetuity.”).

85. Bray, *supra* note 12, at 138.

86. *Id.*

87. See *id.*

Treasury Regulation § 1.170A-14⁸⁸ provides that an easement may be terminated if “changed conditions . . . make impossible or impractical the continued use of the property for conservation purposes.”⁸⁹ In such a case, the easement holder must use its share of the proceeds from a subsequent sale of the property consistently with the easement’s conservation purposes.⁹⁰ However, this limited “substitution provision”⁹¹ only accounts for situations where fulfilling the conservation purpose is impossible or impractical.⁹² It does not account for situations where substituting another parcel of land would simply better serve the easement’s conservation purposes.

V. PROPOSAL

The facts in *Belk I* can be distinguished from the example given above. In the example above, the parties’ reason for substituting land, and thus the purpose of including a substitution provision in the easement, is to better serve the easement’s conservation purpose. In *Belk I*, the Petitioners included the substitution provision for their own private benefit.⁹³ Hypothetically, Petitioners could substitute land to increase their income from the surrounding residential units. The substitution provision allowed Petitioners to substitute land for any reason, provided that the conservation purpose was protected along with other requirements.⁹⁴ If SMNLT did not consent to a proposed substitution, SMNLT had to help Petitioners identify land that would meet the substitution provision requirements “but also accomplish [*Petitioners*] objectives.”⁹⁵ Therefore, the purpose of the substitution provision was to benefit Petitioners personally, and not to enhance the conservation value of the easement. After all, the golf course could be built and maintained on any of the 410 acres, so shifting the golf course to another location would not likely have

88. Treas. Reg. § 1.170A-14 (as amended in 2009).

89. *Id.* § 1.170A-14(g)(6)(i).

90. *Id.*

91. *See Belk II*, 105 T.C.M. (CCH) 1878, *9–10 (2013) (explaining that Treasury Regulation section 1.170A-14 allows for “substitutions” where complying with easement’s restrictions becomes impossible or impractical).

92. Treas. Reg. § 1.170A-14(c)(2).

93. *See Belk I*, 140 T.C. 1, 3–4 (2013).

94. *Id.*

95. *Id.* at 4 (emphasis added).

made the golf course any better, bigger, more beautiful, or more open to public. Rather, a substitution would have resulted in Petitioners' private benefit by increasing the value of their residential development.

Where a charitable contribution under section 170 results in a private benefit to the donor, the amount of the charitable deduction must be reduced by the amount of the benefit.⁹⁶ That is, a contribution is not "charitable" to the extent that it benefits the donor.⁹⁷ If, due to a substitution Petitioners' 410 acres increased in value, Petitioners would have to subtract this increase from the amount of their charitable deduction.⁹⁸ But in this case, Petitioners would have already taken the deduction, and the statute of limitations could run before a substitution ultimately took place, preventing the IRS from contesting the deduction.⁹⁹ The purpose of Petitioners' substitution provision, and the likely effect of an actual substitution, would be to privately benefit Petitioners, without a corresponding public benefit or decrease in Petitioners' deduction. Thus, Petitioners should not be entitled to a charitable contribution deduction for their easement.

A conservation easement with a substitution provision should be deductible when the purpose of the provision is to further the easement's conservation purposes. Where the purpose of the substitution provision is to benefit the private landowner, the conservation easement should be ineligible for the deduction. This proposed rule satisfactorily addresses both the facts in *Belk I* and the hypothetical given in Part IV.D. As explained above, substitution provisions can be useful tools in drafting conservation easements to effectively serve their conservation purposes. But an easement containing a substitution provision designed to benefit the landowner is not a "charitable" contribution as required by section 170, because the donor can privately benefit from a substitution without increasing

96. See Rev. Rul. 67-246, 1967-2 C.B. 104.

97. See *United States v. Am. Bar Endowment*, 477 U.S. 105, 118 (1986); *Scheidelman v. Comm'r*, 682 F.3d 189, 199 (2d Cir. 2012); *Winters v. Comm'r*, 468 F.2d 778, 780 (2d Cir. 1972).

98. See Treas. Reg. § 1.170A-14(h)(3)(i) (as amended in 2009) ("[I]f the donor . . . receives, or can reasonably expect to receive, a financial or economic benefit that is substantial, but it is clearly shown that the benefit is less than the amount of the transfer, then a deduction under this section is allowable for the excess of the amount transferred over the amount of the financial or economic benefit received or reasonably expected to be received by the donor . . .").

99. See 26 U.S.C. § 6501(a) (2012).

the public value of the contribution.¹⁰⁰ One of the leading scholars in conservation easements has expressed the need for “[r]easonable rules regarding the amendment of perpetual conservation easements—rules that ensure sufficient flexibility to . . . adapt to changing circumstances.”¹⁰¹ Permitting substitutions only when they further the conservation purposes of the easement and not when they bestow private benefit should be one of these rules.

VI. DOES A GOLF COURSE HAVE A “CONSERVATION” PURPOSE?

Another issue lurking within *Belk I*, and perhaps indirectly influencing the court’s decision, is whether a golf course possesses a sufficient conservation purpose. Many golf courses “literally comply with [section] 170(h),”¹⁰² since they provide outdoor recreation for the public.¹⁰³ However, many conservation groups and legislators have argued that golf courses should not be within the “conservation purposes” allowed by the Code.¹⁰⁴

For instance, in the wake of alleged abuses of section 170(h), the Joint Committee on Finance held a hearing in 2005 suggesting proposals to reform section 170(h).¹⁰⁵ Many of the speakers suggested that easements covering golf courses should not be eligible for the deduction because golf courses are not natural and do not yield a significant public benefit.¹⁰⁶

In March 2014, the Obama administration proposed eliminating the deduction for golf courses.¹⁰⁷ The administration argued that the private benefit gained from easements on golf courses often outweighs the public benefit.¹⁰⁸ Further, construction of golf courses can actually lead to environmental degradation. As the facts in *Belk I*

100. *See Am. Bar Endowment*, 477 U.S. at 118.

101. McLaughlin, *supra* note 13, at 720.

102. Kertz, *supra* note 3, at 150.

103. 26 U.S.C. § 170(h)(4)(A)(i).

104. Kertz, *supra* note 3, at 150.

105. *The Tax Code and Land Conservation: Report on Investigations and Proposals for Reform: Hearing Before the S. Comm. on Finance*, 109th Cong. 4 (2005).

106. *See, e.g., id.* at 3, 6–7 (statement of Rand Wentworth, President, Land Trust Alliance); *id.* at 9 (statement of Steven T. Miller, Internal Revenue Serv. Comm’r, Tax-Exempt Entities).

107. DEP’T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION’S FISCAL YEAR 2015 REVENUE PROPOSALS 195 (2014), available at <http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2015.pdf>.

108. *See id.*

illustrate, section 170(h) is not “narrowly tailored to promote only bona fide conservation activities.”¹⁰⁹ An easement covering a golf course surrounded by a residential development is hardly a “conservation activity.”¹¹⁰ And the easement is probably going to benefit the developer more often than the public.¹¹¹

Belk I was not the best test case for substitution provisions. The easement covered a golf course, the golf course was surrounded by development, and Petitioners took a deduction of more than ten million dollars.¹¹² These facts likely influenced the court’s decision to deny the deduction outright as opposed to denying it on valuation grounds. The court overstated the “restriction-in-perpetuity requirement,” in an attempt to deny a deduction for a conservation easement possessing little public benefit and considerable private benefit. Nevertheless, the court’s flat ban on substitution provisions is not desirable. If Congress agrees that easements on golf courses do not provide a sufficient public benefit, Congress should amend section 170(h).¹¹³

VII. CONCLUSION

Petitioners’ easement should not have failed for lack of perpetuity. The easement’s restrictions were perpetual to the extent that they were always in effect and could not be terminated by the parties.¹¹⁴ However, Petitioners did not accurately value their easement. Petitioners should have considered the value of the 410 acres before and after granting the easement.

In some situations, easements with substitution provisions should be eligible for the deduction under section 170(h). Specifically, when the purpose of the substitution provision is to further the easement’s conservation purpose, the easement should be eligible for the deduction. When the purpose of the substitution provision is to bestow private benefit on the landowner, the provision

109. *Id.*

110. *Id.*

111. *Id.*

112. *Belk I*, 140 T.C. 1, 2–3, 5 (2013).

113. See McLaughlin, *supra* note 13, at 713–14 (arguing that litigation is not the best way to establish clear rules consistent with congressional intent and that section 170(h) or the regulations should be revised).

114. See *Belk I*, 140 T.C. at 3–4.

should render the easement ineligible as not constituting a “charitable” contribution under section 170.

Golf courses arguably do not possess bona fide conservation value. Easements preserving golf courses, especially those surrounded by residential development, probably result in a larger private benefit than public benefit. Despite the particular facts in *Belk I*, substitution provisions should be encouraged when they further the easement’s conservation purposes. Thus, a substitution provision should not in itself render an easement ineligible for a deduction under section 170.